No. 83-372
IN THE

Supreme Court of the United States

October Term, 1983

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellant,

vs.

UNITED STATES POSTAL SERVICE,
Appellee.

On Appeal From the United States Court of Appeals for the Ninth Circuit.

BRIEF OF APPELLANT, FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA.

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Questions Presented.

1. Was the Franchise Tax Board of the State of California prohibited by the doctrine of pre-emption from using its tax levy to garnish the wages of Postal Service employees to collect delinquent income taxes notwithstanding the fact that:

a. At least seven separate Circuit Courts of Appeal have held that ordinary judgment creditors may garnish the wages of these same Postal Service employees.

b. The California statute which authorized said collection (California Revenue and Taxation Code § 18817) pertained only to the collection of delinquent income taxes and thus could not conflict with 5 U.S.C. § 5517 which deals with a totally separate area, to wit, the withholding of current anticipated tax liabilities.

Parties to This Action.

The parties to this action are:

1. The Franchise Tax Board of the State of California.
2. The United States Postal Service.

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OPINIONS BELOW.

The Opinion of the Court of Appeals for the Ninth Circuit, filed on February 10, 1983, is reported at 698 F.2d 1029 and is reproduced at A. 1 - A. 16 of the Franchise Tax Board's Jurisdictional Statement.[1] The Court of Appeals' Order Amending Opinion and Denying Rehearing was filed on June 3, 1983, and is reproduced at A. 26. The Judgment of the United States District Court for the Central District of California was filed on July 7, 1980, and is reproduced at A. 17-18. The Findings of Fact and Conclusions of Law for the United States District Court for the Central District of California were filed on August 6, 1980 and are reproduced at A. 19-25.

[1]Citations in the form "A. . . ." are to the Appendix to the Jurisdictional Statement filed by the Franchise Tax Board and in the form "J.A. . . ." to the Joint Appendix.

Jurisdiction.

This suit was brought in District Court by the Franchise Tax Board (the "Board"). (J.A. 8-44.) The District Court granted judgment for the United States Postal Service (the "Postal Service"). (A. 17-18.) The Board appealed to the Court of Appeals for the Ninth Circuit. The Opinion of the Court of Appeals affirming the judgment granted by the District Court was filed on February 10, 1983. (A. 1-16.) A timely Petition for Rehearing And Suggestion That Rehearing Be En Banc was filed on February 24, 1983. (J.A. 51-61.) The Petition for Rehearing was denied on June 3, 1983. (A. 26.)

The Board filed a Notice of Appeal to the Supreme Court of the United States from the opinion on August 12, 1983, with the clerk, United States Court of Appeals for the Ninth Circuit. (A. 27.) This appeal was docketed on August 31, 1983. On January 9, 1984, this Court noted probable jurisdiction. (J.A. 62.)

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(2).

Such a direct appeal is allowed where a Court of Appeals holds a State statute to be invalid as repugnant to the Constitution, treaties or laws of the United States. Herein the Court of Appeals for the Ninth Circuit held that California Revenue and Taxation Code § 18817 was preempted by 5 U.S.C. § 5517 insofar as it allowed the Franchise Tax Board to garnish the wages of United States Postal Service employees.

Constitutional Provisions and Statutes Involved.

California Revenue and Taxation Code section 18817 provides in pertinent part:

> "The Franchise Tax Board may . . . require any employer, person, . . . having in their possession, or under their control, any credits or other personal property or other things of value, belonging to a taxpayer . . . to withhold, from such credits or other personal property or other things of value, the amount of any tax, interest, or penalties due from the taxpayer . . . and to transmit the

amount withheld to the Franchise Tax Board at such times as it may designate."

California Revenue and Taxation Code section 18818 provides as follows:

"Any employer or person failing to withhold the amount due from any taxpayer and to transmit the same to the Franchise Tax Board after service of a notice pursuant to Section 18817 is liable for such amounts."

39 U.S.C. § 401 provides in pertinent part:

"The Postal Service shall have the following general powers:

"(1) to sue and be sued in its official name; . . ."

39 U.S.C. § 410 provides in pertinent part:

"(a) Except as provided . . . or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, . . . employees, . . . shall apply to the exercise of the powers of the Postal Service. . . ."

5 U.S.C. § 5517 provides in pertinent part:

Withholding State income taxes

"(a) When a State statute —

(1) provides for the collection of a tax either by imposing on employers generally the duty of withholding sums from the pay of employees and making returns of the sums to the State, or by granting to employers generally the authority to withhold sums from the pay of employees if any employee voluntarily elects to have such sums withheld; and

(2) imposes the duty or grants the authority to withhold generally with respect to the pay of employees who are residents of the State;

the Secretary of the Treasury, under regulations prescribed by the President, shall enter into an agreement with the State within 120 days of a request for agreement from the proper State official. The agreement shall provide that the head of each agency of the United States shall comply with the requirements of the State with-

holding statute in the case of employees of the agency who are subject to the tax and whose regular place of Federal employment is within the State with which the agreement is made . . .

"(b) This section does not give the consent of the United States to the application of a statute which imposes more burdensome requirements on the United States than on other employers, or which subjects the United States or its employees to a penalty or liability because of this section . . ."

31 C.F.R. § 215.12 provides in pertinent part:

"Nothing in this agreement shall be deemed:

(a) To require collection by agencies of the United States of delinquent tax liabilities of Federal employees or members of the Armed Forces, or

(b) To consent to the application of any provision of law of the State, city or county which has the effect of:

(1) Imposing more burdensome requirements upon the United States than it imposes on other employers, or

(2) subjecting the United States or any of its officers or employees to a penalty or liability. . . ."

Statement of the Case.

The Franchise Tax Board is the agency of the State of California charged with the enforcement of the Personal Income Tax Law of the State of California.

During July and August 1978, the Franchise Tax Board issued to the Postal Service four Orders to Withhold pursuant to § 18817 of the California Revenue and Taxation Code attempting to garnish wages of four of its tax debtors who were employed by the Postal Service. (J.A. 19, 24, 31, 36, 45-48.) The Postal Service refused to honor the Franchise Tax Board's Orders, contending instead that any funds owed to the tax debtors-employees were not subject to the Franchise Tax Board's Order to Withhold. (J.A. 21, 26, 33, 38, 46-48.)

On December 13, 1978, the Franchise Tax Board filed a complaint against the Postal Service for failure to deliver per-

sonal property levied upon. (J.A. 8-44.) The Franchise Tax Board sought to recover the amount owed by the Postal Service to each of the four tax debtors at the time of the service of the respective Orders to Withhold (hereinafter sometimes referred to as wage garnishments) up to the amount of delinquent taxes owed to the Franchise Tax Board. *Id.*

On March 23, 1979, the Postal Service filed its Answer. (J.A. 45-50.)

In a companion case the Employment Development Department filed a complaint to enforce a levy upon the accounts receivable owed by the Postal Service to two mail transportation contractors who were delinquent in paying their unemployment insurance taxes. (A. 2.)

The actions were consolidated. (Clerk's Record (CR), Document No. 12.)

The Franchise Tax Board and the Employment Development Department filed motions for summary judgment. (CR, Document No. 18.) The Postal Service filed a motion for judgment on the pleadings or in the alternative for summary judgment. (CR, Document No. 19.)

On July 7, 1980, Judgment was entered in favor of the Postal Service and against the Franchise Tax Board and the Employment Development Department dismissing the actions. (A. 17-18.) On August 6, 1980, Findings of Fact and Conclusions of Law were filed by the Court. (A. 19-25.)

On September 2, 1980, the Employment Development Department filed its Notice of Appeal to the Court of Appeals for the Ninth Circuit. (CR, Document No. 29.) On September 3, 1980, the Franchise Tax Board filed its Notice of Appeal to the Court of Appeals for the Ninth Circuit. (CR, Document No. 20.)

On February 10, 1983, the Court of Appeals for the Ninth Circuit filed an opinion (one judge dissenting in part) affirming in part and reversing in part the judgment of the United States District Court. (A. 1-16.) Specifically, the Court of Appeals reversed the summary judgment of the United States District Court granted against the Employment Development Depart-

ment and in favor of the U.S. Postal Service, and affirmed the summary judgment of the United States District Court granted against the Franchise Tax Board and in favor of the U.S. Postal Service. The dissenting Judge agreed with the majority opinion which reversed the summary judgment against the Employment Development Department but dissented from the majority opinion which affirmed the summary judgment against the Franchise Tax Board. (A. 15-16.)

A Petition For Rehearing And Suggestion That Rehearing Be En Banc was timely filed by the Franchise Tax Board only. (J.A. 51-61.) The Court of Appeals issued an Order Amending Opinion and Denying Rehearing on June 3, 1983. (A. 26.)

With regard to the Franchise Tax Board case, the Ninth Circuit Majority Opinion found that the Franchise Tax Board levies were prohibited by 5 U.S.C. § 5517 and apparently also by 31 C.F.R. § 215.12(a). (*Employment Development Department v. U.S. Postal Service* (1983) 698 F.2d 1029, 1035-1036.) (A. 9-13.)

The dissenting Judge in the Ninth Circuit Opinion below stated that 5 U.S.C. § 5517 was a limited waiver of sovereign immunity but that the Postal Reorganization Act waived Postal Service immunity without any qualification regarding state tax procedures. The dissenting Judge pointed out that the federal courts have consistently held that 39 U.S.C. § 401(1) waives Postal Service immunity from state garnishment proceedings. The Judge concluded that the Franchise Tax Board's tax levy was essentially a garnishment procedure and he could see no reason why Congress would want to treat the Postal Service employees' tax debts any differently than it treats their other debts. *Employment Development Department v. U.S. Postal Service* (*supra*) 698 F.2d 1029, 1037-1038. (A. 15-16.)

With regard to the Employment Development Department case, the Ninth Circuit Majority Opinion found the Employment Development Department's administrative tax levy should be honored. It found that the levy statute was not inconsistent with and therefore not preempted by 39 U.S.C. § 5006. The Court pointed out that 39 U.S.C. § 5006 was not the exclusive

method of attaching Postal Service funds owed to contractors or subcontractors and that other Circuit Courts had allowed garnishment of Postal Service funds without regard to whether the debt garnished was owed to a contractor or subcontractor. *Employment Development Dept. v. U.S. Postal Service, supra*, 698 F.2d 1029, 1033-1034. (A. 6-7.)

The Board filed a Notice of Appeal to the Supreme Court of the United States with regard to that portion of the Ninth Circuit Opinion dealing with the Franchise Tax Board's levy statute. (A. 27.) The Postal Service did not seek further review from this Court with regard to the Employment Development Department portion of the Opinion.

SUMMARY OF ARGUMENT.

The Postal Service may sue and be sued. Congress has not given it any sovereign immunity and/or Congress has waived its sovereign immunity. Waivers of governmental immunity from suit should be liberally construed. The doctrine of sovereign immunity is not favored.

Seven separate Circuits have held that ordinary judgment creditors of Postal Service employees may garnish their wages. The Ninth Circuit is the first Circuit to prohibit a garnishment of Postal Service employees' wages.

Over forty-five years ago, this Court set out the principles with regard to the creation and/or waiver of sovereign immunity.

F.H.A. v. Burr (1940) 309 U.S. 242 held that a judgment creditor could garnish the wages of an F.H.A. employee and that when Congress launches a governmental entity into the commercial world and endows it with authority to "sue and be sued," that agency it just as amenable to judicial process as private enterprise under the same circumstances.

When this Court has discussed whether a governmental agency is amenable to a particular incident of suit, *e.g.*, garnishment, the payment of costs, there has been an emphasis on the fact that the agency is engaging in business transactions with the public and it has been launched into the commercial world.

It is clear that the Postal Service has been launched into the commercial world. Congress intended to establish the Postal Service as an efficient, self-sustaining entity. The Postal Service is now akin to any other employer in the commercial world. Thus, it is not inconsistent with the new statutory scheme and with the intent of Congress to allow the Board to levy on wages of Postal Service employees, and if the Postal Service refuses to honor such levy, it should be liable for the consequences of its refusal.

Congress did not intend the Postal Service's "sue and be sued" clause to be interpreted narrowly. Congress did not intend to exclude garnishment from the "sue and be sued" clause because the Postal Reorganization Act is silent as to garnishment. Where Congress has intended to exclude garnishment from a waiver of sovereign immunity, it has done so specifically.

California's levy statute was not preempted by 5 U.S.C. § 5517. In the absence of a federal statute which explicitly prohibits garnishment of Postal Service employees for state tax debts, California must be allowed to utilize its tax levy.

5 U.S.C. § 5517 was enacted in order for the federal government to *cooperate* with state wage withholding programs with regard to federal employees. Congress could not have intended the same statute to preclude a State from collecting delinquent taxes.

Wage garnishment of delinquent tax liabilities and payroll withholding of current anticipated tax liabilities do not involve the same subject matter. Payroll withholding was not begun until 1972 in California while garnishment provisions for delinquent tax liabilities have existed for over forty years. The present California withholding statutes are found in the California Unemployment Insurance Code and the wage garnishment statutes are found in the California Code of Civil Procedure. This demonstrates that the tax levy and withholding statutes do not concern the same subject matter.

There is no conflict between 5 U.S.C. § 5517 and the Board's levy statute. The Board does not impose more burdensome

requirements on the United States than on other employers. No liability is being asserted against the Postal Service *because* of 5 U.S.C. § 5517. The Board is not suing under § 5517. It is suing under its own statute, Revenue and Taxation Code § 18817. The Board is not requiring the Postal Service to collect delinquent taxes under the authority of § 5517.

Two separate sovereign immunities are involved in this case. 5 U.S.C. § 5517 is a limited waiver of sovereign immunity which applies to *all* federal agencies wherein the federal government cooperates with States by withholding current anticipated tax liabilities. 39 U.S.C. § 401(1) is a general waiver of sovereign immunity which applies only to the Postal Service.

A tax may be self-determined by the taxpayer or assessed by the Franchise Tax Board. Where it is assessed by the Franchise Tax Board, the taxpayer has numerous opportunities to protest the assessment before he has to pay and even after he pays, he may bring a suit for refund in the Superior Court.

The Board may institute tax collection proceedings without obtaining a state court judgment. When an assessment becomes final, the Board is then analogous to a judgment creditor and the tax levy is like a judgment creditor's garnishment.

Summary administrative proceedings to collect taxes have been upheld by this Court. No "judgment" is necessary. A tax assessment is given the force of a judgment and if the amount is not paid when due, administrative officials may seize the debtor's property to satisfy the debt.

Ordinary employers must honor tax levies from the Board. The Postal Service is similar to other employers in business and must also honor the tax levy. If the Postal Service failed to honor a wage garnishment from an ordinary judgment creditor, the creditor could institute legal action against the Postal Service. If the Postal Service refuses to honor the Board's levy, the consequences should be no different.

It is the policy of the Federal Government that its employees have an ethical responsibility to pay their state taxes. The salaries of employees of the Federal Government are not immune from tax. Congress consented to the levy and collection of various taxes from federal employees in federal areas.

ARGUMENT.

I.

INTRODUCTORY STATEMENT.

A majority of the Ninth Circuit panel below has held that California's income tax levy statute, Revenue and Taxation Code § 18817 is preempted by 5 U.S.C. § 5517 and thus California is prohibited from garnishing the wages of United States Postal Service employees to collect delinquent taxes.[2] This conclusion was reached even though the Postal Service honors wage garnishments from ordinary judgment creditors.

The Ninth Circuit panel has erroneously stated that Revenue and Taxation Code § 18817 and 5 U.S.C. § 5517 deal with the same subject matter. Specifically, the Ninth Circuit has held that Revenue and Taxation Code § 18817 which deals with the collection of *delinquent* state income taxes has been preempted by 5 U.S.C. § 5517 which deals only with withholding of current anticipated tax liabilities.

The distinction between garnishment of wages to satisfy delinquent tax liabilities on the one hand and payroll withholding to satisfy current anticipated tax liabilities on the other, is crucial. While 5 U.S.C. § 5517 does not *authorize* garnishment of federal employees' wages for delinquent state tax debts, it does not *prohibit* such garnishment if permissible under other statutes (*e.g.*, 39 U.S.C. § 401(1)).

5 U.S.C. § 5517 provides that the Secretary of the Treasury will enter into a contract with States which want federal agen-

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[2]Prior to 1980 and during the period relevant to this proceeding, California Revenue and Taxation Code § 18817 authorized the Order to Withhold which was used to garnish wages and/or levy on personal property which belonged to a delinquent taxpayer. Since 1980, administrative tax levies on *wages*, called Earnings Withholding Orders for Taxes, have been governed by California Code of Civil Procedure §§ 723.070, *et seq.* operative January 1, 1980, and succeeded by California Code of Civil Procedure §§ 706.070, *et seq.*, operative July 1, 1983. Revenue and Taxation Code §§ 18817, *et seq.*, still apply to levies on personal property other than wages. Earnings Withholding Order for Taxes are essentially the same as the previous Order to Withhold in that they are both administrative tax levies and the order may be issued whether or not the state tax liability has been reduced to judgment. Code of Civil Procedure § 706.072.

cies and instrumentalities to withhold estimated state tax liabilities from the wages of federal employees. This is a limited waiver of sovereign immunity for all federal agencies.

By contrast, 39 U.S.C. § 401(1) is a *general* waiver of immunity for the Postal Service only. Pursuant to this section, the Board may require the Postal Service to honor a wage garnishment for delinquent taxes.

The important consideration here is that the Board's wage garnishment statute cannot conflict with 5 U.S.C. § 5517 because the Board is relying on 39 U.S.C. § 401(1), not 5 U.S.C. § 5517, to require the Postal Service to honor its garnishment.

It is at this point that the nature of the Postal Service must be emphasized. It has been unanimously held by every federal court of appeal which has considered the issue, that the Postal Service's sovereign immunity was generally waived by the Postal Reorganization Act of 1970. *See, e.g., Beneficial Finance Co. of New York, Inc. v. Dallas* (2nd Cir. 1978) 571 F.2d 125, 127-8. Therefore, unlike other federal agencies which may have retained their sovereign immunity (other than that which was waived by 5 U.S.C. § 5517), the Postal Service is amenable to the use of all state tax collection devices.[3]

5 U.S.C. § 5517 was enacted in order for the federal government to *cooperate* with state wage withholding programs with regard to federal employees. It is not logical to conclude that Congress would also intend that 5 U.S.C. § 5517 could be used to prohibit states from collecting delinquent taxes from Postal Service employees.

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[3] Compare an analogous situation where the Postal Service argued unsuccessfully that 42 U.S.C. § 659 (statute authorizing wage garnishment for alimony and child support debts for all federal employees) barred garnishment of Postal employees' wages for commercial debts. In *Iowa-Des Moines Nat. Bank v. United States* (S.D. Iowa 1976) 414 F.Supp. 1393, the Court held that since the Postal Service had already consented to "sue and be sued," in 39 U.S.C. § 401(1), the consent of the United States in 42 U.S.C. § 659 (for alimony and child support debts) is superfluous insofar as garnishments against the Postal Service are concerned. *Id.* at 1397.

Similarly, 5 U.S.C. § 5517 may well be superfluous insofar as the Postal Service is concerned given the fact that 39 U.S.C. § 401(1) is a general waiver of sovereign immunity.

The result of the Ninth Circuit opinion is that in order for a State to establish a program with a federal agency under 5 U.S.C. § 5517 to withhold current anticipated tax liabilities from federal employees, the State must forfeit its right to collect delinquent tax liabilities by garnishing the wages of these employees. Congress could not have intended such a result.

The Postal Service should cooperate with the states in the collection of current and delinquent taxes. It does not contribute to the general welfare for the Postal Service to frustrate the legitimate tax collection activities of the states. There can be no public purpose served by allowing Postal Service employees to escape paying their taxes.

The majority Opinion of the Ninth Circuit panel is clearly erroneous and has created an anomalous situation. This is the first time insofar as the Franchise Tax Board is aware, that any Circuit court has prohibited a levy or garnishment of the wages of Postal Service employees.

The Postal Reorganization Act of 1970[4] reorganized the functions of what previously was referred to as the United States Post Office into the United States Postal Service. In connection with this reorganization, section 401(1) of the Postal Reorganization Act waived the sovereign immunity of the Postal Service without any qualification regarding the collection of delinquent taxes owed by its employees and provided that it may "sue and be sued." The phrase "sue and be sued" embraces all civil legal proceedings. *General Elec. Credit Corp. v. Smith* (4th Cir. 1977) 565 F.2d 291, 292. The Postal Service can "sue and be sued" like a private employer. 39 U.S.C. § 401(1); See *F.H.A. v. Burr* (*supra*) 309 U.S. 242, 245.

Relying on this waiver of sovereign immunity, at least seven Circuits have allowed ordinary judgment creditors to garnish

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[4]Act of August 12, 1970, Pub. L. No. 91-375, 84 Stat. 719, codified at 39 U.S.C. §§ 101, *et seq.*

the wages of Postal Service employees for payment of *any* debt owed by the employees. However, the Ninth Circuit panel herein barred the Franchise Tax Board from using its tax levy to garnish those same wages of those *same* Postal Service employees for payment of state income taxes. In light of the vital importance of the prompt collection of state taxes and the absence of any qualification upon the waiver of sovereign immunity of the Postal Service in 39 U.S.C. §§ 401, *et seq.*, the majority opinion must be reversed.

The Postal Service would distinguish the Franchise Tax Board's levy from that of other general creditors in that general creditors must obtain a court judgment before they garnish an employee's wages while the Franchise Tax Board is not required to obtain a court judgment before it may issue a levy to collect its tax.[5]

As the Board will discuss more fully, *infra*, after a tax liability has become due and payable, the Board has the equivalent of a judgment and has all of the remedies of a judgment creditor. The Order to Withhold is like post-judgment execution. *Randall v. Franchise Tax Board of State of California* (9th Cir. 1971) 453 F.2d 381, 382. Thus it is not necessary for the Board to obtain a court judgment before it levies on the wages of a delinquent taxpayer.

The Postal Service has contended below that it could not honor the Franchise Tax Board's levy because of 31 C.F.R. § 215.12 which states that nothing under the withholding agreements (executed pursuant to 5 U.S.C. § 5517) shall require United States agencies to collect delinquent tax liabilities of federal employees. However, the Postal Service also admitted at oral argument at the district court level that had the Franchise Tax Board obtained a court judgment, the garnishment would have been honored. (A. 35, 41.)

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[5]The Ninth Circuit approved the use of an administrative wage garnishment and did not require the taxing agency to obtain a judgment in the companion Employment Development Department case. The Ninth Circuit apparently relied solely on 5 U.S.C. § 3517 to find that the Franchise Tax Board could not garnish the Postal Service employees' wages.

This admission leaves the Postal Service in the untenable position of arguing that it is prohibited from collecting any delinquent tax liabilities pursuant to 31 C.F.R. § 215.12, yet admitting that it would honor the State's tax levy if the Franchise Tax Board obtained a technical court judgment. The Postal Service is apparently relying on the "delinquent tax liabilities" language of 31 C.F.R. § 215.12, and argues that the section *precludes* the Postal Service from collecting delinquent taxes, yet then admits it *would* collect delinquent taxes if the administrative levy were reduced to judgment. There is no logic in this argument.

In all, the anomalous situation which the majority Opinion has created is simply unsupported by the record and the law. 5 U.S.C. § 5517 and 39 U.S.C. § 401(1) can harmoniously coexist. Wage garnishments for state tax debts of Postal Service employees simply are not preempted by 5 U.S.C. § 5517 because they are *authorized* by 39 U.S.C. § 401(1).

To summarize, the Franchise Tax Board contends that:

1. The Postal Reorganization Act waived generally the sovereign immunity of the Postal Service. At least seven other Circuits have held that ordinary judgment creditors may garnish the wages of Postal Service employees. As such the Franchise Tax Board should have been permitted to use its tax levy to garnish the earnings of the employees of the Postal Service.

2. The collection of state taxes is a matter of extreme importance. Before an infringement upon that vital right may be permitted, it must be clearly demonstrated that indeed a federal statute such as 5 U.S.C. § 5517 was intended to expressly limit that right. However, in this instance, § 5517 was not intended to limit the collection of state taxes; rather it was meant to facilitate that collection through payroll withholding. Contrary to the majority Opinion, § 5517 was not intended to restrict the collection of delinquent state tax liabilities where such collection is authorized under the provisions of another Act of Congress such as 39 U.S.C. § 401(1). The Franchise Tax Board sought only to be permitted to treat the Postal Service as it would a private employer or enterprise. In light

of the Postal Reorganization Act, such a treatment is completely warranted if not mandated.

3. The majority Opinion has created an anomalous situation where the Board's tax levy was not honored to collect the tax debts of Postal employees yet garnishments to collect commercial debts were honored, as were as the administrative tax levies of the Employment Development Department. This is completely unwarranted and in fact conflicts with longstanding authority regarding the preeminence of tax debts.

4. The majority Opinion has disregarded the Postal Service's legal admission that garnishment of Postal employees' wages was permissible, even in light of their 5 U.S.C. § 5517 argument, if the Board obtained a court judgment for taxes. This admission means that the Franchise Tax Board cannot be preempted by 5 U.S.C. § 5517.

5. Finally, as Postal employees reside and are required to pay state and local taxes not only in California but also in virtually all of the States, the problem of how to collect these delinquent liabilities is not exclusive to California.

II.

THE POSTAL SERVICE MAY SUE AND BE SUED. IT HAS NO SOVEREIGN IMMUNITY.

The Postal Reorganization Act of 1970 replaced the United States Post Office with the United States Postal Service. In connection with this reorganization, section 401(1) of the Postal Reorganization Act waived the sovereign immunity of the Postal Service.[6] It provides in pertinent part:

> "The Postal Service shall have the following general powers:
>
> "(1) to sue and be sued in its official name: . . ."

Waivers by Congress of governmental immunity from suit should be construed liberally in the case of federal instru-

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[6]This is assuming the Postal Service was ever given any sovereign immunity by Congress. As this Court in *R.F.C. v. Menihan Corp.* (1941) 312 U.S. 81, pointed out, there is no presumption that an agent of the government is clothed with sovereign immunity. *Id.* at 85.

mentalities. *Keifer & Keifer v. R.F.C.* (1939) 306 U.S. 381; *F.H.A. v. Burr* (1940) 309 U.S. 242, 245; *R.F.C. v. Menihan Corp.* (1941) 312 U.S. 81, 84.

In *F.H.A. v. Burr*, (*supra*), 309 U.S. 242, decided in 1940, this Court pointed out that there was disfavor with the doctrine of governmental immunity from suit. *Id.* at 245. Over 35 years later, in 1975, the Seventh Circuit in *Standard Oil Div., American Oil Co. v. Starks* (7th Cir. 1975) 528 F.2d 201 cited numerous authorities for the proposition that the "widespread dissatisfaction with the doctrine of sovereign immunity has continued unabated." *Id.* at 203.

A. The Postal Service Is Not Immune From Garnishment Proceedings.

Pursuant to this waiver of sovereign immunity, Federal Courts of Appeal in seven of the Circuits have expressly held that the Postal Service is not immune from state garnishment or other related proceedings. *Kennedy Elec. Co., Inc. v. United States Postal Serv.* (10th Cir. 1974) 508 F.2d 954, 960; *Standard Oil Div., American Oil Co. v. Starks* (7th Cir. 1975) 528 F.2d 201, 204; *May Dept. Stores Co. v. Williamson* (8th Cir. 1977) 549 F.2d 1147, 1149; *Goodman's Furniture v. United States Postal Service* (3rd Cir. 1977) 561 F.2d 462, 465; *General Elec. Credit Corp. v. Smith* (4th Cir. 1977) 565 F.2d 291, 292; *Beneficial Finance Co. of New York, Inc. v. Dallas* (2nd Cir. 1978) 571 F.2d 125, 127-128; *Assoc. Financial Services of America v. Robinson* (5th Cir. 1978) 582 F.2d 1. The Ninth Circuit has also stated in dicta that 39 U.S.C. § 401 above may now permit suits against the Postal Service that were prohibited against its predecessor, such as garnishment proceedings. *Sportique Fashions, Inc. v. Sullivan* (9th Cir. 1979) 597 F.2d 664, 665-666, fn. 2. The essence of these holdings is that pursuant to 39 U.S.C. § 401(1), the Postal Service stands in no different position than a private enterprise and thus, cannot use the doctrine of sovereign immunity in

order to block state garnishment or other related procedings.[7] As far as the Board is aware, no Circuit before this decision of the Ninth Circuit has ever held that the Postal Service is immune from state garnishment.[8]

In a well-known trilogy of cases decided over 40 years ago, this Court set forth general guidelines with regard to the proper application of the principle of sovereign immunity.

In *Keifer & Keifer v. R.F.C.* (1939) 306 U.S. 381, this Court found that a governmental corporation was amenable to suit even though it had no "sue and be sued" clause. This Court stated, "the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work." *Id.* at 388.

Congress has provided that various governmental agencies may "sue and be sued." In connection with these agencies, the question has arisen whether "sue and be sued" includes garnishment and attachment.

F.H.A. v. Burr (1940) 309 U.S. 242 dealt specifically with the issue of garnishment. This Court allowed a judgment creditor of an F.H.A. employee to garnish the employees' wages. This Court said, "[I]t must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue and be sued', that agency

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[7] If Congress had disagreed with these decisions, it could have changed the law. For example, 38 U.S.C. § 1820(a)(1) initially included a "sue and be sued" clause applicable to the Veteran's Administration. Following a district court decision upholding wage garnishments under that statute against VA employees, the statute was amended to "qualify" the "sue and be sued" clause explicitly stating that wage garnishments were not permitted under the authority of that statute. See *May Dept. Stores Co. v. Smith* (8th Cir. 1978) 572 F.2d 1275, 1277 cert. denied (1978) 439 U.S. 837.

Obviously, if a qualification of the Postal Service's "sue and be sued" clause was intended for tax debts, Congress could have so amended 39 U.S.C. § 401(1).

[8] In fact, Judges in two of the Circuits have been critical of the Postal Service for continuing to litigate the "sue and be sued" clause after they have been unsuccessful in several Circuits. See *e.g.*, Judge Lay in *May Dept. Stores Co. v. Williamson, supra*, 549 F.2d 1147, 1149-1150; and Judge Weis in *Goodman's Furniture v. United States Postal Serv., supra*, 561 F.2d 462, 465-466.

is not less amenable to judicial process than private enterprise under like circumstances would be." *Id.* at 245.

In *F.H.A. v. Burr, supra*, this Court also found that "sue and be sued" included "all civil process incident to the commencement or continuance of legal proceedings", and that garnishment and attachment are generally included by statute in the process of collecting a debt. *Id.* at 245-246.

The test of *Burr* applies to the Postal Service because it is clear it has been launched into the commercial world and does indeed engage in commercial and business transactions with the public. *See, Standard Oil Div., American Oil Co. v. Starks, supra*, 528 F.2d 201, 204; *May Dept. Stores Co. v. Williamson, supra*, 549 F.2d 1147, 1148.

Finally, in *R.F.C. v. Menihan Corp.* (1941) 312 U.S. 81, this Court found that the "sue and be sued" clause applicable to the Reconstruction Finance Corporation (R.F.C.) authorized the allowance of costs against the R.F.C. in an unsuccessful lawsuit. This Court found that the R.F.C. transactions were "akin to those of private enterprise" *Id.* at 83, and "the mere fact that it is an agency of the government does not extend to it the immunity of the sovereign." *Id.*

B. Congress Has Made the Postal Service Independent and Has Given It the Attributes of a Business.

The legislative history and statutory scheme make it clear that Congress intended that the Postal Service function as a business and operate independently.

The Postal Service is an "independent establishment of the executive branch of the Government of the United States . . ." (39 U.S.C. § 201.)

Congress intended the Postal Service to be conducted in a "businesslike way." (1970 U.S. Code Cong. & Admin. News, pp. 3649, 3660.)

Congress intended to introduce modern management and business practices to the Postal Service by eliminating various legislative, budgetary, personnel and financial problems which had hindered the old Post Office. *Id.* at 3650.

The following demonstrate the many ways that Congress has created the Postal Service in the image of a business.

The Postal Service may, *inter alia*, enter into and perform contracts, execute instruments and determine how its money will be spent; determine and keep its own system of accounts, acquire, hold, maintain, sell and lease real or personal property, construct, operate, lease and maintain buildings, facilities, equipment or improvements on property owned or controlled by it, accept gifts or donations and settle and compromise claims against it. (39 U.S.C. §§ 401(3)-(9).)

It is clear that Congress intended to pattern the Postal Service after private industry in the area of labor relations. The employees of the Postal Service have the right to organize into bargaining units and to bargain with management with regard to wages, hours, and working conditions. (39 U.S.C. §§ 1201, *et seq.*) The National Labor Relations Board, not the Federal Labor Relations Authority, 5 U.S.C. §§ 7101, *et seq.*, supervises the organizing process. (39 U.S.C. §§ 1202, *et seq.*)

"Generally speaking, H.R. 17070 would bring postal labor relations within the same structure that exists for nationwide enterprises in the private sector. Rank and file postal employees would, for the first time, have a statutory right to organize collectively and to bargain collectively with management on all of those matters — including wages and hours — which their neighbors in private industry have long been able to bargain for." (1970 U.S. Code Cong. & Admin. News, pp. 3649, 3662.)

The Postal Service is also quite autonomous in the area of fiscal affairs.

Congress meant for the Postal Service "to become self-sustaining — eliminating the postal deficit — by January 1, 1978." *Id.* at 3659.

The capital of the Postal Service is separate from the capital of the United States, 39 U.S.C. § 2002; the Postal Service has exclusive control over the Postal Service Fund which finances the day to day operations of the Postal Service, 39 U.S.C. § 2003; the Postal Service has the authority to borrow

money and to issue obligations without the prior consent of the United States Treasury, 39 U.S.C. §§ 2005, 2006.

The legislative history indicates that the public obligations:

> "would not be guaranteed by the United States and would not be within the debt ceiling unless the Postal Service requests the Secretary of the Treasury to pledge the full faith and credit of the United States and the Secretary determines that it would be in the public interest to do so." 1970 U.S. Code Cong. & Admin. News, pp. 3649, 3659.

The Postal Service was organized in such a way that the management of the Postal Service would be insulated from the arena of politics. *Id.* at 3660.

The Postmaster General was taken out of the President's cabinet and the authority to appoint and supervise him was given to a Board of Governors. (39 U.S.C. §§ 202(c), 203.)

The Postal Service has liberal powers with regard to the areas of employment, 39 U.S.C. §§ 1001, *et seq.*, and transportation, 39 U.S.C. §§ 5001, *et seq.*

The Postal Service has the right to obtain necessary property and services independently of the executive agencies. 39 U.S.C. § 410(a), 39 C.F.R., § 601.

The Postal Service has also been freed from many of the former constraints on the Post Office. 39 U.S.C. § 410(a) provides that, with a few exceptions, "no Federal Law dealing with public or Federal contracts, property, works, officers, employees, budgets or funds . . . shall apply to the exercise of the powers of the Postal Service."

As the Postal Service was "launched into the commercial world," under the Postal Reorganization Act (See *Standard Oil, supra*, 528 F.2d 201, 204; *Goodman's, supra*, 561 F.2d 462, 464-465, *May Dept. Stores, supra*, 549 F.2d 1147, 1148; *Beneficial Finance, supra*, 571 F.2d 125, 127-128), there is clearly no basis in law or policy for blocking the instant action wherein the Postal Service has acted in violation of the Board's tax levy. The Postal Service is simply not immune from the Board's tax collection procedures.

If a private employer or enterprise acted in violation of California Revenue and Taxation Code §§ 18817-18819, the Board could institute legal action against that private employer or enterprise to recover the amounts not transmitted to the Board.

The Postal Service is now akin to any other employer in the commercial world and since all other employers are required to honor the Franchise Tax Board's levy, there is no reason why the Postal Service should be treated differently.

C. Congress Did Not Intend the Sue and Be Sued Clause to Be Used in a Narrow Sense.

As this Court pointed out in *F.H.A. v. Burr, supra*, 309 U.S. 242, where Congress intends to preclude garnishment from a "sue and be sued" clause, it has done so explicitly. *Id.* at 247.

The only restrictions on the waiver of immunity created by 39 U.S.C. § 401 are found at 39 U.S.C. § 409(b) which provides that the Postal Service will have the benefit of certain procedures that are applicable to suits against the United States and its officers and 39 U.S.C. § 409(c) which provides that the Federal Tort Claims Act is applicable to the Postal Service.

The Postal Reorganization Act is silent as to garnishment. This is significant because when Congress wishes to exclude garnishment from a waiver of sovereign immunity it knows how to do that.

With regard to the Secretary of Education, 20 U.S.C. §1132d-1(b) provides in pertinent part that:

> "[T]he Secretary may . . . sue and be sued . . . but no attachment, . . . garnishment . . . shall be issued against the Secretary. . . ."

With regard to the Small Business Administration, 15 U.S.C. § 634(b)(1) provides that "[T]he Administrator may sue and be sued . . . but no attachment . . . garnishment . . . shall be issued against the Administrator. . . ."

As the Second Circuit pointed out in *Beneficial Finance* (*supra*), 571 F.2d 25, Congress created the Postal Service 30

years after this Court's decision in *F.H.A. v. Burr, supra*. Thus, Congress was aware that a broadly worded "sue and be sued" clause would be interpreted as a liberal waiver of Postal Service immunity and if Congress had intended to create a more narrow waiver of immunity, it could have done so. *Id.* at 128.

III.

CALIFORNIA'S LEVY STATUTE WAS NOT PREEMPTED BY 5 U.S.C. § 5517.

A. Introduction.

In deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause, it is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question of whether they are in conflict. *Perez v. Campbell* (1971) 402 U.S. 637, 644. The court's function is to determine whether a challenged state statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hines v. Davidowitz* (1941) 312 U.S. 52, 67; Accord, *Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 526; *Ray v. Atlantic Richfield Co.* (1978) 435 U.S. 151, 158. An unconstitutional conflict will be found where compliance with both the federal and state statutes is a physical impossibility. *Florida Avocado Growers v. Paul* (1963) 373 U.S. 132, 142-3.

It will *not be presumed* that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so, since the exercise of federal supremacy is not lightly to be presumed. *Schwartz v. Texas* (1952) 344 U.S. 199, 202-3. Conflicts between state and federal statutes should *not* be sought out where *none clearly exist*. *Seagram & Sons v. Hostetter* (1966) 384 U.S. 35, 45, reh. den. (1966) 384 U.S. 967.

The exceptional importance of the collection of state taxes is not a matter which should be lightly cast aside. In the absence of a federal statute which explicitly prohibits garnishment of wages of Postal employees for state tax debts, this vital means

of collection of these liabilities must be preserved not only for California but also for any other state in which Postal employees reside.

The State of California has an extremely important interest in collecting taxes from its taxpayers. This interest which is shared by all other states and taxing authorities was recognized long ago by this Court in *Dows v. City of Chicago* (1870) 78 U.S. (11 Wall.) 108, where a National Bank tried to restrain the collection of a tax levied by the City of Chicago upon the bank's capital shares. This Court decided that no court could enjoin the collection of the tax, and stated as follows:

> "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." *Id.* at 110.

This Court also stated that "[T]he prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government" (*Springer v. United States* (1880) 102 U.S. (12 Otto) 586, 594), and that "taxes are the life-blood of government, and their prompt and certain availability an imperious need." (*Bull v. United States* (1935) 295 U.S. 247, 259; Accord *G.M. Leasing Corp. v. United States* (1977) 429 U.S. 338, 350.)

5 U.S.C. § 5517 was enacted originally in 1952 as 5 U.S.C. § 84b. Act of July 17, 1952, Pub. L. No. 82-587, 66 Stat. 765. It was enacted in order for the federal government to cooperate with state tax wage withholding programs with respect to federal employees. In fact, the Congressional debate with regard to § 5517 made it clear that it has been the long-standing policy of Congress "not to interfere with the enforcement or collection of state income tax laws." *Lung v. O'Cheskey* (D.N.M. 1973) 358 F.Supp. 928, 932, affirmed (1973) 414 U.S. 802.

The legislative history of 5 U.S.C. § 5517 is clear that current state payroll withholding akin to the income tax with-

holding provisions of the Internal Revenue Code (Codified at 26 U.S.C. §§ 3401, *et seq.*) was the sole aim of the legislators. The following statement by Representative Prouty, from Vermont, is illustrative:

> "The enactment of S. 1999 would accord to the States the same cooperation in tax collections which the Federal Government demands from them . . . and therefore increase the revenue of State governments, lessening their dependence on the Federal Government and strengthening our system of duality of sovereignty." (98 Cong. Record-House 9374 (1952).)

Furthermore, the legislative history indicates that Section 5517 was enacted because Congress believed without the statute, federal agencies lacked authority to withhold state income taxes from the wages of their employees. *See*, 98 Cong. Record-House 9374 (1952); Sen. Rept. No. 1309 reprinted in 1952 U.S. Code Cong. & Admin. News p. 2360; House Rept. No. 2474 reprinted in 1952 U.S. Code Cong. & Admin. News pp. 2433, 2434. As such, section 5517 was a limited waiver of sovereign immunity for all federal agencies solely in the area of payroll withholding of current anticipated tax liabilities.

B. Wage Garnishment and Payroll Withholding Do Not Involve the Same Subject Matter.

In reaching its conclusion that 5 U.S.C. § 5517 preempts the Board's wage garnishments under California Revenue and Taxation Code § 18817, the majority opinion has incorrectly stated that §§ 5517 and 18817 deal with the same subject matter. *Employment Development Dept. v. U.S. Postal Service, supra*, 698 F.2d 1029, 1036. (A. 13.) However, 5 U.S.C. § 5517 is only involved with payroll withholding of current anticipated tax liabilities. It neither prohibits nor permits wage garnishment of delinquent tax liabilities. Section 18817 is only involved with the collection of delinquent tax liabilities. The State of California has a full scheme of payroll withholding statutes patterned after the Internal Revenue Code designed for the collection of current anticipated tax liabilities. Section 18817 is not part of that scheme.

Payroll withholding under California Law is a relatively recent phenomenon in that it was not until 1972 that it commenced with respect to California residents. California Revenue and Taxation Code section 18806 (as it read prior to 1980 repeal and reenactment).[9] On the other hand, the Franchise Tax Board's garnishment provision under § 18817 has been in existence for some forty years. Currently, payroll withholding is administered by the Employment Development Department and the pertinent statutes are now found in California Unemployment Insurance Code §§ 13000, *et seq*. Moreover, wage garnishments for taxes are now controlled by provisions of California Code of Civil Procedure §§ 706.070 *et seq*. (See footnote No. 2 *supra*.) This plainly indicates that the placement of the prior California payroll withholding provisions (§§ 18805-18816) under the same Article and Chapter of the California Revenue and Taxation Code as the prior wage garnishment provisions (§§ 18817-18819) simply does not mean that they involve the same subject matter.

To further demonstrate the diverse nature of payroll withholding and wage garnishment, it should be noted that comparable federal payroll withholding and federal wage garnishments for taxes do not appear in the same Subtitle much less

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[9]It was only after the enactment of the withholding statutes that California had any interest in requesting a § 5517 agreement from the Secretary of the Treasury. On February 25, 1974, the State of California executed an agreement with the United States Secretary of the Treasury which provided, inter alia, that agencies of the United States would comply with California's withholding provisions. (J.A. 3-5.)

In its Petition for Rehearing, the Board pointed out to the Ninth Circuit that it was incorrect when it stated that the State of California entered into a § 5517 agreement on November 6, 1952. (J.A. 57.)

The Board pointed out that California entered into the § 5517 agreement in February of 1974 (J.A. 57) and further, that California did not even begin payroll withholding of California residents until January 1, 1972. *Id*.

The Ninth Circuit amended its opinion to state that "[U]ncontroverted evidence in the record establishes that as early as 1962, withholding was provided by agreement pursuant to § 5517 between the Secretary of the Treasury and the State of California." (A. 26.) The Board respectfully contends that the amended Opinion is still incorrect in light of the fact that withholding for California residents in California did not begin until 1972.

same Chapter of the Internal Revenue Code. The payroll withholding provisions can be found at 26 U.S.C. §§ 3401, *et seq.* These provisions are located in Chapter 24 of Subtitle C of the Code. However, the Internal Revenue Service's wage garnishment provisions are found in Chapter 64 of Subtitle F at 26 U.S.C. §§ 6331, *et seq.*

The California payroll withholding and garnishment provisions were patterned after the Internal Revenue Code.

A. With regard to *withholding*, compare:

1. California Revenue and Taxation Code § 18806 (the former withholding statute)

2. California Unemployment Insurance Code §§ 13020-13031 (the present withholding statutes)

3. 26 U.S.C. § 3402 (the present Internal Revenue Code withholding statute)

B. With regard to *wage garnishment, for taxes* compare:

1. *Authorization to garnish wages*
   a. California Revenue and Taxation Code § 18817 (effective for wage garnishments until January 1, 1980)
   b. California Code of Civil Procedure §§ 723.070, *et seq.* (effective January 1, 1980)
   c. California Code of Civil Procedure §§ 706.070, *et seq.* (effective July 1, 1983)
   d. 26 U.S.C. § 6331(a) and (d).
2. *Liability for failure to honor levy*
   a. California Revenue and Taxation Code § 18818 (effective for wage garnishments until January 1, 1980.)
   b. California Code of Civil Procedure § 723.153 (effective January 1, 1980)
   c. California Code of Civil Procedure § 706.153 (effective July 1, 1983)
   d. 26 U.S.C. § 6332(c)(1).
3. *Immunity from liability for compliance*
   a. California Revenue and Taxation Code § 18819 (effective for wage garnishments until January 1, 1980)

b. California Code of Civil Procedure § 723.154 (effective January 1, 1980)
c. California Code of Civil Procedure § 706.154(b) (effective July 1, 1983)
d. 26 U.S.C. § 6332(a) and (d).

The Board respectfully contends that the majority Opinion has mischaracterized the position of the Board. The Board is not contending that the general waiver of sovereign immunity under 39 U.S.C. § 401(1) overrides 5 U.S.C. § 5517. Rather, the Board has argued that 5 U.S.C. § 5517 only applies to current payroll withholding and by its terms does not prohibit wage garnishment for state taxes provided authority to garnish exists under the provisions of other statutes. Two separate sovereign immunities are involved in this case — 5 U.S.C. § 5517 and 39 U.S.C. § 401(1). The sovereign immunity which was waived to a limited degree in 5 U.S.C. § 5517 applied to all federal agencies and pertained only to current payroll withholding of state taxes for those agencies. However, the sovereign immunity which was waived in 39 U.S.C. § 401(1) is a general waiver of sovereign immunity which applied only to the Postal Service. This general waiver has been interpreted by Circuit Courts in at least seven of the Circuits as permitting garnishment of Postal employees' wages. There is no qualification on this waiver of sovereign immunity. Moreover, there is no qualification or limitation on the type of debts which can be garnished from Postal Service employees' wages. Logically speaking, there is no reason to treat Postal employees' commercial debts any differently than their tax debts. Indeed, the majority Opinion below has placed these tax debts on a lower plane than commercial debts which is completely contrary to long established authority.

In the instant matter, the Board utilized its tax levy which is like post-judgment execution. *Randall v. Franchise Tax Board* (9th Cir. 1971) 453 F.2d 381, 382. The tax levy, unlike the wage withholding provisions of 5 U.S.C. § 5517, reaches "any credits or other personal property or other things of value, belonging to a taxpayer . . ." California Revenue and Taxation Code § 18817. The tax levy is a collection device which

can be used to collect delinquent tax liabilities. The wage withholding provisions of 5 U.S.C. § 5517 cannot be so used. See, 31 C.F.R. § 215.12. The Postal Service and the Ninth Circuit have attempted to extend 5 U.S.C. § 5517 far beyond its legislative intent. 5 U.S.C. § 5517 pertains only to payroll wage withholding and has no applicability with respect to the collection of delinquent tax liabilities from Postal Service employees.

It is not reasonable to conclude that Congress intended States to forfeit their means of collecting delinquent taxes in order to establish a program for withholding current anticipated taxes from federal employees.

Plainly, the majority's analysis below in attempting to find a conflict between 5 U.S.C. § 5517 and California Revenue and Taxation Code § 18817 is faulty. Payroll withholding is not the same as wage garnishment. Section 5517 does not deal with wage garnishment nor does it purport to prohibit wage garnishment of federal employees where such is authorized under another statute.

C. As There Is No Actual Conflict Between 5 U.S.C. § 5517 and California Revenue and Taxation Code Sections 18817-18818, the Supremacy Clause Does Not Bar the Board's Action Herein.

One critical question which must be answered in any matter when the preemption of state statutes by federal statutes is alleged is whether there really is a conflict between the statutes. It is the Board's position that a close scrutiny of 5 U.S.C. § 5517 will reveal that no conflict exists.

Subdivision (b) is the portion of 5 U.S.C. § 5517 which the Ninth Circuit majority found to conflict with California Revenue and Taxation Code § 18817. It provides in pertinent part:

> "(b) This section does not give the consent of the United States to the application of a statute which imposes more burdensome requirements on the United States than on other employers, or which subjects the United States

or its employees to a penalty or liability because of this section."

It is clear that *identical* requirements were imposed upon *all* employers under California Revenue and Taxation Code §§ 18817-18819. No distinction was made between the United States and other employers. Thus, the first part of 5 U.S.C. § 5517(b) is not violated. Cf. *Clincher v. United States, States of Montana & Arizona* (Ct. Cl. 1974) 499 F.2d 1250, 1253-4, cert. denied (1975) 420 U.S. 991.

The second phrase in 5 U.S.C. § 5517(b) ("or which subjects the United States or its employees to a penalty or liability *because of this section*") (Emphasis added), is also not in conflict with §§ 18817-18819 due to the inclusion of the provision "because of this section". The Board is *not* suing for violation of the agreement set forth in 5 U.S.C. § 5517. It is suing for violation of § 18817 under the authority of § 18818. No penalty or liability because of 5 U.S.C. § 5517 is being sought. Accordingly, no conflict between state and federal statutes clearly exists in this matter and none should be sought out. *Seagram & Sons, Inc. v. Hostetter* (1966) 384 U.S. 35, 45, reh. den. (1966) 384 U.S. 967. The Postal Service can comply with § 5517 and simultaneously honor the Board's tax levy while doing no injustice to the requirements of § 5517. Thus, there is absolutely no impossibility of being able to comply with both the federal and state statutes. *Florida Avocado Growers v. Paul, supra,* 373 U.S. 132, 142-3. Finally, as Congress enacted 5 U.S.C. § 5517 in order to *cooperate* with state tax collection, it cannot seriously be contended that § 18817 stands as an obstacle to the accomplishment and execution of these cooperative purposes and objectives of Congress. See 1952 U.S. Code Cong. & Admin. News pp. 2360-1, 2433-4, *Hines v. Davidowitz, supra,* 312 U.S. 52, 67.

Apparently, the Ninth Circuit also found that 31 C.F.R. § 215.12(a) prohibited the Board's levy. 31 C.F.R. § 215.12(a) provides, *inter alia,* that nothing under the withholding agreements executed pursuant to 5 U.S.C. § 5517 shall require United States agencies to collect delinquent tax liabilities of Federal employees.

That regulation, however, has no application because the Board is *not* seeking to require collection of delinquent tax liabilities under authority of the 5 U.S.C. § 5517 wage withholding agreement. That agreement has nothing to do with whether the Board can collect delinquent tax liabilities through its tax levy statutes. Rather, the Franchise Tax Board is relying solely on its own statutes, Revenue and Taxation Code §§ 18817 and 18818 and 39 U.S.C. § 401(1) to require the Postal Service to honor its levy for delinquent, not current, taxes. This is not prohibited and in fact is allowed by the Postal Reorganization Act.

Finally, it is to be noted that the terms of 5 U.S.C. § 5517 and 31 C.F.R. § 215.12(a) do *not* prohibit the Board's action in any event. The code section and the regulation merely indicate that the collection of delinquent tax liabilities is not authorized thereunder. The instant action of the board is not to enforce the aforementioned agreement but instead, to simply require an employer to comply with California Revenue and Taxation Code §§ 18817-18819.

IV.

THE BOARD MAY INSTITUTE TAX COLLECTION PROCEEDINGS WITHOUT OBTAINING A STATE COURT JUDGMENT PRIOR THERETO.

A. The Board's Procedures.

In this matter, the Board has complied with all of the provisions of the Revenue and Taxation Code in establishing the liabilities of the taxpayers involved in this proceeding. The taxes were due and payable at the time of the Board's tax levy.

A tax may be due and payable where the taxpayer files a return without payment of the self-computed tax shown on the return or the Franchise Tax Board may examine taxpayer returns and determine that additional tax is due. In the latter situation the Franchise Tax Board may mail notice of a proposed deficiency. Revenue and Taxation Code § 18583. If the taxpayer disagrees with the proposed assessment, he may file

a protest under Revenue and Taxation Code § 18590. Upon a protest, the Franchise Tax Board reconsiders the proposed assessment and shall grant the taxpayer an oral hearing if requested. Revenue and Taxation Code § 18592.

If the Franchise Tax Board acts unfavorably on the taxpayer's protest, the taxpayer may appeal such action to the California State Board of Equalization. Revenue and Taxation Code § 18593. The State Board of Equalization thereafter hears the appeal and determines the matter after independent review. Revenue and Taxation Code § 18595.

The taxpayer still has another remedy because upon payment of the assessment, a claim for refund may be filed, Revenue and Taxation Code § 19053, and if the claim is denied, he may file a suit for refund in the Superior Court. Revenue and Taxation Code § 19082. As the Board will discuss *infra*, these procedures clearly meet all requirements of Due Process.

After the tax becomes due and payable, the Board has several alternative methods by which it may effect collection. The methods are cumulative and may be used in combination with or separate from each other. (Revenue and Taxation Code § 18931.)

The Postal Service which admittedly was the employer of three of the four tax debtors in question was required by Revenue and Taxation Code § 18817 to transmit the amounts owed to the tax debtors to the Board. (*See, People v. Freeny* (1974) 37 Cal.App.3d 20, 31; 112 Cal.Rptr. 33, 41.) Any employer required to transmit any amount was to do so without resort to any court action. (Revenue and Taxation Code § 18819.) Accordingly, the law *compelled* the Postal Service to deliver the funds in question to the Board. (*See, Kanarek v. Davidson* (1978) 85 Cal.App.3d 341, 346; 148 Cal.Rptr. 86, 89.)

Any employer failing to transmit the amount due to the Board after service of an Order-to-Withhold is liable to the Board for such amount. (Revenue and Taxation Code § 18818.)

As the Postal Service failed to comply with the law, it is liable to the Board for the amounts it should have transmitted. If the Postal Service failed to honor a garnishment from an

ordinary judgment creditor, the Postal Service would be liable for that action and the consequences should be no different with regard to a levy of the Board.

B. It Was Not Necessary for the Board to Obtain a Judgment. When the Assessment Becomes Final, the Board Is Analogous to a Judgment Creditor and the Order to Withhold Is Like a Judgment Creditor's Garnishment.

The heretofore cited Postal Service garnishment cases should dispose of the instant action favorably to the Board. The main difference between the Postal Service cases and the wage garnishment of the Board is that the other creditors had obtained a state court judgment and were seeking to collect ordinary debts while the Board was seeking to collect a delinquent tax pursuant to a tax levy.

At the oral argument of the cross motions in the instant matter, it was stated by counsel for the Postal Service that had the Board obtained a technical state court "judgment" and levied on that "judgment," the Postal Service would have honored that levy. (A. 35, 41.) However, counsel for the Postal Service contended that the Board's tax levy would not be honored because the Postal Service believes there is no determination of liability in this instance. (A. 41.) The Postal Service's statements are completely erroneous and fly directly in the face of long-standing and well established authority upholding the validity and constitutionality of summary tax collection procedures.[10]

It is clear that the Board's levy is analogous to a judgment creditor's garnishment. In *Randall v. Franchise Tax Board of State of California* (9th Cir. 1971) 453 F.2d 381, the Board levied upon the taxpayer's employer after the taxpayer had

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[10]The fallacy of this argument is further highlighted by the fact that the Postal Service did not seek review from this Court of that portion of the Ninth Circuit Opinion below which allowed the Employment Development Department to use an administrative levy to levy on monies owed to mail transportation contractors. (*Employment Development Dept. v. U.S. Postal Service, supra*, 698 F.2d 1029, 1033-1034; A. 6-7.)

filed a return without full payment of the self-computed tax. The Court allowed the levy and stated that its use was "like post-judgment execution." *Id.* at 382. This case obviates any argument the Postal Service can make with regard to the need for a judgment before honoring the tax levy.

Summary administrative proceedings to collect taxes have been consistently upheld by this Court. Summary collection procedures to collect delinquent taxes are constitutionally permissible. No "judgment" of any kind is necessary. *Phillips v. Commissioner* (1931) 283 U.S. 589, 595-7; *Bull v. United States* (1935) 295 U.S. 247, 260; *G.M. Leasing Corp. v. United States* (1977) 429 U.S. 338, 352 fn. 18; *Scottish Union & Nat. Ins. Co. v. Bowland* (1905) 196 U.S. 611, 632; *Bomher v. Reagan, supra* (9th Cir. 1975) 522 F.2d 1201, 1202.

A tax assessment is given the force of a *judgment*, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt. *Bull v. United States, supra,* 295 U.S. 247, 260; quoted with approval in *G.M. Leasing Corp. v. United States, supra,* 429 U.S. 338, 352, fn. 18. The underlying rationale for approval of the summary procedures is that the very existence of government depends upon the prompt collection of the revenues. *Id.* As long as there is an adequate opportunity for a post-seizure determination of the taxpayer's rights, the statute authorizing summary collection procedures meets the requirements of due process. *Phillips v. Commissioner, supra,* 283 U.S. 589, 596-597. A suit for refund is an adequate alternative means of subsequent judicial review. *Id.*, at 597-598.

The Board has the status of a judgment creditor and is entitled to all of the remedies associated therewith. See *Randall v. Franchise Tax Board of State of California* (9th Cir. 1971) 453 F.2d 381, 382; *Kelly v. Springett* (9th Cir. 1975) 527 F.2d 1090, 1094; *Aronoff v. Franchise Tax Board of State of California* (9th Cir. 1965) 348 F.2d 9, 10-11; *C.I.T. Corporation v. United States* (N.D. Calif. 1972) 344 F.Supp. 1272, 1276; *United States v. Fisher* (N.D. Calif. 1948) 93 F.Supp. 73, 75-76.)

The Board's tax collection procedures conform to the standards set forth above by this Court. In this case, collection of delinquent taxes is permitted without obtaining a state court judgment prior thereto. The taxpayer has available to him or her subsequent judicial review in the form of the suit for refund procedure. California Revenue and Taxation Code §§ 19081-19092.

V.

UNDER THE BUCK ACT THE BOARD HAS THE POWER TO LEVY AND COLLECT PERSONAL INCOME TAX FROM POSTAL SERVICE EMPLOYEES.

It is the long established policy of the Federal Government that its employees have an ethical responsibility to pay their state taxes. *Non-resident Taxpayers Ass'n. v. Municipality of Phila.* (3rd Cir. 1973) 478 F.2d 456, 459.

In 1939, this Court held that the salaries of employees or officials of the federal government or its instrumentalities were not immune from taxation by the states. *Graves v. N.Y. ex. rel. O'Keefe* (1939) 306 U.S. 466, 480-7; *State Tax Comm'n v. Van Cott* (1939) 306 U.S. 511, 515.

In the same year as the *Graves* decision, Congress passed the Public Salary Act of 1939 (4 U.S.C. § 111, formerly 5 U.S.C. § 84a), expressly consenting to state taxation of pay or compensation for personal service of federal employees.

In 1940, Congress enacted the Buck Act (4 U.S.C. §§ 105-110) which gave consent to the levy and collection of various taxes from federal employees in federal areas. Section 106 of the Buck Act authorizes the *levy* and *collection* of state income taxes from federal employees.

It is important to note that 4 U.S.C. § 106(a) speaks in terms of the State having full jurisdiction and power to levy and collect income taxes within a "federal area" just as if it were not a federal area. *Howard v. Commissioners* (1953) 344 U.S. 624, 628-9.

The term "federal area" is defined in section 110(e) of the Buck Act and has been recently held by the Supreme Court of Colorado to include the branch offices of the Postal Service

as well as the main post offices. *Rountree v. City and County of Denver* (Colorado 1979) 596 P.2d 739, 740-1. As a result, the City and County of Denver was permitted to levy and collect from eight Postal Service employees an occupation tax regardless of the working location of the employees. *Id.*

Unquestionably, in order to give the Buck Act any meaning, the taxing authority must have the power to *enforce* the levying and collection of its tax both within and without federal areas. Such a result has been reached in *City of Philadelphia v. Konopacki* (Penn. 1976) 366 A.2d 608, 610.

CONCLUSION.

Congress could not have intended for a State to forfeit its ability to collect delinquent income taxes by its participation in a 5 U.S.C. § 5517 agreement.

The Postal Reorganization Act waived the sovereign immunity of the Postal Service. The Board is entitled to the rights and remedies of a judgment creditor. As such it should be permitted to garnish the earnings of the employees of the Postal Service.

For these reasons, the Board respectfully contends that the decision of the Ninth Circuit Court of Appeals below should be reversed.

Respectfully submitted,

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